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Cochrane, L., & Boyle, K. (2018). The complexities of human rights and constitutional reform in the United Kingdom: Brexit and a Delayed Bill of Rights: Informing (on) the Process. *Northwestern Journal of Human Rights*, 16(1), 22-46. [2].

**Published in:**  
Northwestern Journal of Human Rights

**Document Version:**  
Peer reviewed version

**Queen's University Belfast - Research Portal:**  
[Link to publication record in Queen's University Belfast Research Portal](#)

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## The complexities of human rights and constitutional reform in the United Kingdom

### *Brexit and a Delayed Bill of Rights: Informing (on) the Process*

Katie Boyle<sup>1</sup> & Leanne Cochrane<sup>2 3</sup>

*The United Kingdom's politicised and contested human rights framework has come under increasing pressure during recent periods of constitutional and political instability. The UK 2016 referendum on membership of the European Union, the delayed repeal of the Human Rights Act 1998 and the proposals to enact a British Bill of Rights have all shaped the discourse at the national level around decisions to retain rights (or not) rather than progressively improve the human rights structure. The European Union and Council of Europe human rights frameworks act as important pillars of human rights and democracy under the UK constitution and each of the devolved constitutions. Constitutional processes such as Brexit risk further confusing an already incoherent and complex human rights framework. This lack of clarity in terms of the future of the human rights regime in the UK and devolved regions has meant that there has been a lack of constitutional safeguards in place to protect human rights and thus far insufficient parliamentary scrutiny. The impact at the supra-national level undermines the UK as a global actor and the impact at the devolved sub-national level is further fragmenting state unity where devolved jurisdictions are on different, and often more progressive, human rights trajectories. The UK is in the process of sleepwalking into a legal human rights deficit. We argue here that this lacunae in legal protections offers, if not necessitates, the opportunity to re-imagine human rights structures in a progressive way embedded in processes that must be genuinely deliberative, informed, participative and inclusive.*

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<sup>3</sup> The authors are grateful to the Economic and Social Research Council for funding the 'Human Rights in Transition: Impact for the UK in a Changing Europe' project under the UK in a Changing Europe Programme. Research for this article was informed by a workshop convened by the authors at the University of Roehampton on May 17, 2016. Keynote contributions can be viewed on the Conference Roehampton YouTube channel, available at <https://www.youtube.com/channel/UC7uwJt2-g-wEYh8aPyQqvTw>. The authors are also grateful to the UK British Academy and in particular Dr Veronika Fikfak, Professor Sionaidh Douglas-Scott, Professor Alison Young and the other participants for providing feedback as part of the 'Human Rights after Brexit - The Future of Human Rights in the UK' workshop held at the University of Cambridge, March 23, 2017. All views and errors are the authors own.

## INTRODUCTION

This article sets out the highly politicised and contested human rights legal framework in the United Kingdom in order to assess what kind of space human rights might occupy in the UK's unique constitutional framework in the future. It does so in the context of two separate yet intertwined constitutional processes related to broader European frameworks. The first is the decision to leave the European Union ('Brexit'), determined by a UK wide popular vote of 51.9% on 23 June 2016.<sup>4</sup> The second is the UK Government's promise (currently on hold) to introduce a British Bill of Rights to replace the Human Rights Act 1998, the statute that partially incorporates the European Convention on Human Rights into domestic law.<sup>5</sup>

The purpose of the paper is first and foremost to tease out the complexity of the changing human rights frameworks (at the national and devolved levels). It does so against a backdrop of constitutional and political instability in the UK; a matter of critical importance when the rights and processes associated with change are contested politically. It speculates the potential impact of both reform processes, and ultimately advocates for a model of protection referred to as 'EU/ECHR +'. Such an outcome refers to substantive rights protection rather than just procedural form. While the immediate concern is to ensure that rights protection is not undermined by either process, the article supports a deeper look at UK human rights law during but primarily post-Brexit. The 'plus' is intentionally not prescriptive beyond an advocacy for broader protection of socio-economic rights—in essence highlighting, in the first instance, the particular accountability gap in this area. We suggest that a more coherent human rights framework would more closely reflect the broader international human rights framework. However, we also caution that any consideration of how the human rights framework might change going forward should be predicated by an inclusive process that ensures lengthy deliberation across the jurisdictions that is fair, participative, democratic and informed. The article engages beyond the local to address a European and international readership cognisant that the debates underpinning the reform processes will ruminate at a global level, not least, because of the nationalist overtones. As such, the article adopts a deliberate broad brush to the constitutional context and issues at play, highlighting where relevant some key considerations for other liberal democracies also revisiting rights and democracy and their connection to supra-national and sub-national relationships in the current global climate.

This article is divided into three core sections. Section one seeks to do the necessary scene-setting establishing the constitutional status of human rights against which the reform processes currently take place. Sections two and three look at the EU human rights framework and the Human Rights Act 1998 respectively, and their ongoing and future reform. Section two queries how far the UK's constitutional framework can go when on course to remove existing European pillars of democracy and human rights while section three considers whether calls to replace the Human Rights Act with a British Bill of Rights is

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<sup>4</sup> The Electoral Commission, EU Referendum Result, [www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information](http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information) (England voted to leave with 53.2% vote and Wales with 51.7% vote; whereas, Scotland voted to remain with 62% vote and N.I. with 55.7% vote).

<sup>5</sup> THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 37 (2017), <https://www.conservatives.com/manifesto>.

a misdirection away from other more legitimate concerns. All three sections incorporate a specific focus on devolution, a crucial and often under-considered element of the UK constitution in the context of human rights. The article concludes by drawing together the comments of the two reform sections. Constitutional transitions are difficult but perhaps there is an opportunity for the UK to avoid the path of retrogression in what promises to be a continuingly global world.

### *A. Political Context*

By means of introduction it is important to note the political context of the processes of constitutional change. Both reform processes center on a desire to reclaim sovereignty by repatriating power from Europe to the UK – the notion of “taking back control” has been consistently invoked before the electorate.<sup>6</sup> The briefing notes to the Queen’s Speech of 27 May 2015 reasoned that a repeal of the Human Rights Act was necessary for the UK to “have more control over its affairs” and to “restore common sense to the application of human rights laws”;<sup>7</sup> while the Vote Leave referendum campaign conducted the following year adopted the phrase as a core mantra.<sup>8</sup>

It is a sovereignty that traditionally (and consistently) is understood to rest with the Westminster Parliament, though both reform discourses also include the desire to see UK courts as the highest judicial authority.<sup>9</sup> Yet the weeks and months that followed the EU referendum suggest another conception of sovereignty at play in the minds of the electorate, that of popular sovereignty. The arguments which preceded the *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 W.L.R. 583, jurisprudence<sup>10</sup> have served to highlight this dichotomy of perception, whereby the popular vote (as an exercise of direct democracy) is set at odds with parliamentary approval for major constitutional change.<sup>11</sup> Polarising forms of direct and representative democracy, if not accommodated carefully, can threaten processes of constitutional change—such as was

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<sup>6</sup> ‘Taking Back Control From Brussels,’ Vote Leave Briefing Room, [www.voteleavetakecontrol.org/briefing\\_control.html](http://www.voteleavetakecontrol.org/briefing_control.html). For a discussion, see Sarah Longlands, *A Year Since the UK Voted to Take Back Control - But Control of What?*, LSE BRIT. POL. & POL’Y BLOG (June 23, 2017), <http://blogs.lse.ac.uk/politicsandpolicy/taking-back-control-one-year-on/>.

<sup>7</sup> The Queen’s Speech 2015, Briefing Notes, Addressed to Both Houses of Parliament, 6, 75 (May 27, 2015).

<sup>8</sup> See *Vote Leave Take Control*, [www.voteleavetakecontrol.org/](http://www.voteleavetakecontrol.org/).

<sup>9</sup> It should be acknowledged here that while a contested framework is at play at the national level surrounding concepts of sovereignty there is also sub-national frameworks at play further complicating the landscape. Scotland, for example, claims another form of constitutional sovereignty more firmly rooted in civic republican theory. For further discussion, see Sionaidh Douglas-Scott, *A UK Exit from the EU: The End of the United Kingdom or a New Constitutional Dawn?*, CAMBRIDGE J. INT’L & COMP. L., Oxford Legal Studies Research Paper No. 25 (Mar. 7, 2015).

<sup>10</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 W.L.R. 583 (appeal taken from Eng. & Wales, and N.I.).

<sup>11</sup> On the contested and confused nature of these concepts during the EU Referendum campaign, see Sionaidh Douglas-Scott, *Brexit, The Referendum and the UK Parliament: Some Questions about Sovereignty*, U.K. CONST. L. BLOG (June 28, 2016), [www.ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/](http://www.ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/).

evident in the *Miller* case. The media portrayal of this contest vilified the judges as “enemies of the people” by handing back the decision to trigger Article 50 to Parliament following the referendum.<sup>12</sup> Processes that involve amending the constitution tend to follow robust constitutional frameworks governed by a written constitution that carefully accommodates and entrenches rules regarding amendments through formal means subject to scrutiny through formal institutional processes.<sup>13</sup> In the UK, referendums are fairly new constructs of an uncodified constitution. The flexibility of this polity perhaps left the door open to a cascade of constitutional disorder when a process of direct democracy was not only at odds with the representative makeup of parliament but also rejected the very nature of the constitution in and of itself.<sup>14</sup> Indeed, Gordon has highlighted the threat exiting the EU poses for the very foundation of the UK constitution as a challenge both for—and of—the UK constitution.<sup>15</sup>

With that in mind, there is a notable lack of clarity in the two human rights reform processes forming the subject of this article. The debate predating the referendum did little to inform the electorate of the full consequences of human rights change;<sup>16</sup> a situation that has continued post vote. The Joint Committee on Human Rights reported its regret that the Government “has not been able to set out any clear vision as to how it expects Brexit will impact the UK’s human rights framework.”<sup>17</sup> Separately, the House of Lords EU Committee was left “unsure why a British Bill of Rights was really necessary.”<sup>18</sup> This lack of clarity at the national level has undoubtedly inhibited the ability of the electorate and public at large to engage in the discourse in an informed way. It also poses problems in terms of adherence to the rule of law, another fundamental concept in the UK’s constitution which requires legal certainty (and which in its substantive definition includes a commitment to human rights).<sup>19</sup>

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<sup>12</sup> For an example of the headlines dominating the front pages following the decision, see Claire Phipps, *British Newspapers React to Judges' Brexit Ruling: 'Enemies of the People'*, THE GUARDIAN (Nov. 4, 2016), [www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling](http://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling).

<sup>13</sup> Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014).

<sup>14</sup> See, e.g., Martin Loughlin, *The End of Avoidance*, 38 LONDON REV. BOOKS 12 (2016).

<sup>15</sup> Michael Gordon, *Brexit: A Challenge for the UK Constitution, of the UK Constitution?*, 12 EUR. CONST. L. REV. 409, 435 (2016).

<sup>16</sup> See Katie Boyle & Leanne Cochrane, *Rights Derived from EU Law: Informing the Referendum Process*, U.K. CONST. L. BLOG (May 6, 2016), <https://ukconstitutionallaw.org/2016/04/13/katie-boyle-and-leanne-cochrane-rights-derived-from-eu-law-informing-the-referendum-process/>; Katie Boyle & Leanne Cochrane, *Brexit and a British Bill of Rights: Four Scenarios for Human Rights*, THE U.K. IN A CHANGING EUROPE (May 17, 2016), [www.ukandeu.ac.uk/explainers/brexit-and-a-british-bill-of-rights-four-scenarios-for-human-rights/](http://www.ukandeu.ac.uk/explainers/brexit-and-a-british-bill-of-rights-four-scenarios-for-human-rights/); Jo Murkens & Sarah Trotter, *The Implications of Brexit for Fundamental Rights Protection in the UK*, LSE EUR. INST. (Feb. 25, 2016), [www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-6---The-implications-of-Brexit-for-fundamental-rights-protection-in-the-UK.pdf](http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-6---The-implications-of-Brexit-for-fundamental-rights-protection-in-the-UK.pdf).

<sup>17</sup> JOINT COMMITTEE ON HUMAN RIGHTS, *THE HUMAN RIGHTS IMPLICATIONS OF BREXIT*, 2016, HL 88, 9, HC 695.

<sup>18</sup> HOUSE OF LORDS EU COMMITTEE, *THE UK, THE EU AND A BRITISH BILL OF RIGHTS*, 2016, HL 139, 46.

<sup>19</sup> For a substantive view see, TOM BINGHAM, *THE RULE OF LAW* (2011). Lord Bingham’s assessment of the concept considers the rights protected by the Human Rights Act 1998 to be an appropriate starting point: “[t]here are probably rights which could valuably be added to the Convention, but none which could safely be discarded.” Note however, wider criticisms that a fully substantive approach to the rule of law “rob[s] the

The negativity underpinning the discourse on the current human rights framework, which sets it at odds with the UK's legal sovereignty, is fuelling age-old perceptions of a tension between democracy and human rights with human rights regarded as a threat to the national interest.<sup>20</sup> Indeed, the rule of law has long been recognised as not an “entirely harmonious bedfellow” with parliamentary sovereignty.<sup>21</sup> It has been suggested that on deeper analysis this perception arises on the basis of only a narrow set of issues, namely terrorism, crime and immigration.<sup>22</sup> Yet, it is suggested that there is an under-expressed link between the socio-economic rights legal framework and the topics that generate some of the greatest passion within UK policy debates, especially when debated in terms of an adequate standard of living.<sup>23</sup> Examples include healthcare, economic opportunity and social welfare.<sup>24</sup> Leaving the EU is likely to lead to a loss of the EU solidarity rights framework and the potential implications of this require further attention.<sup>25</sup>

Adding to these complications is the divergence of perspectives over the two reforms among the UK's constituent parts. The negative human rights discourse is predominantly demonstrated by the UK Government and elements of the media.<sup>26</sup> Prior to the referendum both the Scottish and Welsh Governments supported the retention of the role played by both EU law and the European Convention on Human Rights in the devolution settlements.<sup>27</sup> The Welsh vote in favour of leaving the European Union by 51.7% has determined the Welsh

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concept of any function which is independent of the theory of justice which imbues such an account of law.” For greater detail, see Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework*, PUB. L. 467, 487 (1997).

<sup>20</sup> David Feldman, *Democracy, Law, and Human Rights: Politics as Challenge and Opportunity*, in PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT 95-96 (Murray Hunt, Hayley J. Hooper & Paul Yowell eds., 2015) (a viewpoint Feldman links with the media). *See also* THE CONSERVATIVE PARTY MANIFESTO 73 (2015), <https://www.conservatives.com/manifesto2015>.

<sup>21</sup> Bingham, *supra* note 19, at ix; *see also* T.R.S. ALLAN, THE SOVEREIGNTY OF LAW: FREEDOM, CONSTITUTION, AND COMMON LAW, 168-208 (2013).

<sup>22</sup> *See* Feldman, *supra* note 20, at 95–96.

<sup>23</sup> For a recent and seminal case referencing the minimum income in assessing the lawfulness of Employment Tribunal fees, see *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51, 3 W.L.R. 409 (appeal taken from Eng. & Wales).

<sup>24</sup> William Jordan, *Health Overtakes Immigration as an Issue for Voters*, YOUNGOV (Apr. 15, 2015), [yougov.co.uk/news/2015/04/15/health-tops-immigration-second-most-important-issu/](http://yougov.co.uk/news/2015/04/15/health-tops-immigration-second-most-important-issu/). For a list of issues identified as main concerns to voters in the UK EU referendum, see ELECTORAL COMMISSION, REFERENDUM ON MEMBERSHIP OF THE EUROPEAN UNION, ¶ 3.80 (2015), [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0004/192127/2015-08-17-EC-59a-15-Question-assessment-report-draft-FULL.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/192127/2015-08-17-EC-59a-15-Question-assessment-report-draft-FULL.pdf).

<sup>25</sup> *See* Katie Boyle & Leanne Cochrane, Report from Human Rights in Transition: the Impact for the UK in a Changing Europe Roundtable, Univ. of Roehampton (May 17, 2016); and *generally on the framework*, Boyle & Cochrane, *supra* note 16.

<sup>26</sup> *See, e.g.*, Tony Blair, Address at Open Britain (Feb. 17, 2017) (commenting on the role of the media in misleading voters pre and post Brexit), [blogs.spectator.co.uk/2017/02/full-transcript-tony-blairs-brexit-speech/](https://blogs.spectator.co.uk/2017/02/full-transcript-tony-blairs-brexit-speech/).

<sup>27</sup> HOUSE OF LORDS EU COMMITTEE, *supra* note 18, at 181.

Government's embracing of Brexit<sup>28</sup> but the overwhelming vote to the contrary in Scotland (62% voted to remain) has strengthened the Scottish Government's resolve to forge an independent settlement deal for Scotland.<sup>29</sup> These positions are of course influenced by the diverging jurisdictional perspectives on the constitutional status of the Union itself: the Scottish Government desire for independence; the Welsh First Minister's proposals for a "new Union" or quasi-federalist state;<sup>30</sup> and a Northern Ireland of slowly diminishing but enduring binary political divides, where approximately half the power-sharing Government (when in existence) also desire to be free from the Union. This has become all the more complicated under the most recent political alliance with the majority unionist party in Northern Ireland, the Democratic Unionist Party ("DUP"), now lending a majority to a minority Conservative Government which lost its majority in the June 2017 snap election. Whilst the DUP and the Conservative parties are firmly committed to reforming the human rights landscape in the UK (with what appears to be a view to removing the UK from the ECHR framework), as a government they are bound to comply with the British-Irish Agreement 1998 – the international treaty guaranteeing equality and human rights by embedding the ECHR in Northern Ireland after the Good Friday Agreement was reached in 1998 (a deal the DUP opposed). At the same time as retrogressive steps are increasingly prevalent under the Conservative DUP coalition the Scottish First Minister, Nicola Sturgeon MP, has formed an expert panel to advise the Scottish Government on how to mitigate against the risk to human rights posed by Brexit with a specific focus on the principles of non-regression, ensuring an equivalence of rights post-Brexit and providing leadership on the future of rights protection. The Scottish Parliament has also legislated to protect EU rights post-Brexit. These diverging trajectories demonstrate the extent to which UK jurisdictions may drift further apart when the EU common framework is removed.

These issues form the political backdrop against which the legal discussion in the following sections takes place. Together this article encourages the reader to ask where next for UK human rights in a *sui generis* constitutional framework.

## I. HUMAN RIGHTS IN CONSTITUTIONAL CONTEXT

Since a core thesis of this article is to tease out the complexity of human rights law in the UK for an international readership, we first of all seek to set the constitutional scene regarding the level of protection accorded to human rights in law and the arrangements that govern the distribution of rights issues between the national and devolved governments. This section culminates in a short explanation of the recent and seminal UK Supreme Court case of *R (Miller) v. Secretary of State for Exiting the European Union*,<sup>31</sup> a judgment handed

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<sup>28</sup> See generally, *Welsh Government White Paper on Securing Wales' Future: Transition from the European Union to a New Relationship with Europe* (2017), [https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future\\_ENGLISH\\_WEB.pdf](https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf).

<sup>29</sup> See generally *Scottish Government White Paper on Scotland's Place in Europe* (Dec. 20, 2016), <http://www.gov.scot/Resource/0051/00512073.pdf>.

<sup>30</sup> Carwyn Jones, Minister of Wales, Keynote Address at the Institute for Government, *Our Future Union: Perspective from Wales* (Oct. 15, 2014), [www.instituteforgovernment.org.uk/events/keynote-speech-rt-hon-carwyn-jones-am-minister-wales-our-future-union-%E2%80%93-perspective-wales](http://www.instituteforgovernment.org.uk/events/keynote-speech-rt-hon-carwyn-jones-am-minister-wales-our-future-union-%E2%80%93-perspective-wales).

<sup>31</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 W.L.R. 583.

down on January 24, 2017, and which dealt with both aforementioned facets of the constitution.

### *A. Common law and statutory rights protection*

Human rights protections within the UK derive from both statutory and common law provisions. Rights emanating from the common law primarily concern civil rights and liberties such as the freedoms of expression and assembly, along with the rights to life, liberty and of access to justice. The development of such rights was superseded (until relatively recently<sup>32</sup>) by the introduction of the Human Rights Act 1998, which incorporates the European Convention on Human Rights into domestic law and, albeit to a lesser extent, the rights contained within EU law.

The UK's constitution is famously uncoded. It operates under the auspice of various constitutional sources including under a set of constitutional principles, most notably that of parliamentary sovereignty and the rule of law. Professor Dicey delivered the orthodox exposition on the principle of parliamentary sovereignty when he defined it to mean that Parliament has “the right to make or unmake any law whatever; and further, that no person or body is recognised by the law [...] as having the right to override or set aside the legislation of Parliament”.<sup>33</sup> As will be seen from the discussion of *Miller* below, parliamentary sovereignty remains the enduring constitutional paradigm within UK law. In terms of the protection of human rights however, the principle has been subjected, under the rule of law, to judicial rules of interpretation, such that common law rights and certain statutes which protect rights are today considered to have a degree of superiority over other more “ordinary” legislative provisions. Such rights have in effect taken on a constitutional status.

In *R v. Lord Chancellor, ex parte Witham*, [1997] EWHC Admin 237, [1998] QB 575, for example, a case which concerned the common law right of access to the courts, the England and Wales High Court announced that such rights “cannot be abrogated by the State save by specific provision in an Act of Parliament...[g]eneral words will not suffice.”<sup>34</sup> Two years later, in *R v. Secretary of State for the Home Department, ex parte Simms* [1999]

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<sup>32</sup> The Conservative discourse that has endured for a number of years now concerning a potential repeal of the Human Rights Act has seemingly resulted in a resurgence in judicial reliance on common law rights protection. See, e.g., *Kennedy v. The Charity Commission* [2014] UKSC 20 para 46, [2015] A.C. 455 (appeal taken from Eng. & Wales) (“The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health...Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake.”) (internal quotations omitted; See, e.g., *R (Evans) v. Attorney General* [2015] UKSC 21, [2015] A.C. 1787 (appeal taken from Eng. & Wales); *O (A Child) v. Rhodes* [2015] UKSC 32, [2016] A.C. 219 (appeal taken from Eng. & Wales); Lady Hale, Keynote Address to the Constitutional and Administrative Law Bar Association Conference 2014, UK Constitutionalism on the March? (Jul. 12, 2014). For a recent overview of common law rights and the Human Rights Act, see MICHAEL TUGENDHAT, LIBERTY INTACT: HUMAN RIGHTS IN ENGLISH LAW (2016).

<sup>33</sup> A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 40 (10th ed. 1965).

<sup>34</sup> *R v. Lord Chancellor, ex parte Witham*, [1997] EWHC 237, [1998] QB 575, ¶ 13.



UKHL 33, [2000] 2 AC 115 (appeal taken from Eng. & Wales), Lord Hoffman for the House of Lords drew parallels between this approach, known as the “principle of legality”, and the principles of constitutionality applied in countries that possess a written constitution: noting there to be “little differen[ce]”.<sup>35</sup> Lord Hoffman further identified the principle of legality’s importance as a check on unintentional interference with fundamental rights by Parliament when he considered its effect to mean that “Parliament must squarely confront what it is doing and accept the political cost,” otherwise, “there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.”<sup>36</sup>

Following the Simms jurisprudence regarding common law rights, a further principle of statutory construction was developed in the case of *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151 whereby legislation that “(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights” would not be subject to the doctrine of implied repeal.<sup>37</sup> To repeal such statutes, the more recent statute must do so expressly. In *Thoburn*, Laws LJ of the Court of Appeal referred to such legislation as “constitutional statutes,”<sup>38</sup> a term that while by no means abandoned by the UK courts, is being gradually recrafted into a more general focus on “constitutional principle(s)”<sup>39</sup> or the “constitutional character” of a particular provision.<sup>40</sup> What is significant is that the devolved statutes, the Human Rights Act 1998 and the European Communities Act 1972—the legislative “conduit pipe” through which EU law and accompanying rights form part of domestic law<sup>41</sup>—have been consistently recognised by the UK courts to have the necessary constitutional character to elevate them above other statutes.<sup>42</sup>

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<sup>35</sup> *R v. Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 (appeal taken from Eng. & Wales).

<sup>36</sup> *Id.*

<sup>37</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] Q.B. 156, ¶ 62. The doctrine of implied repeal presumes that subsequent primary legislation will repeal earlier conflicting provisions, and applies in the ordinary case.

<sup>38</sup> *Id.*

<sup>39</sup> *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, [2014] UKSC 3, ¶ 79, [2014] 1 W.L.R. 324 (appeal taken from Eng. & Wales).

<sup>40</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, ¶ 67, [2017] 2 W.L.R. 583. For Lord Neuberger’s reluctance to comment on whether the Government of Wales Act 2006 should be approached as a constitutional enactment in the reference, see *Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53, 69 [2013] 1 A.C. 792.

<sup>41</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, ¶ 65, [2017] 2 W.L.R. 583 (adopting the term of Professor Finnis).

<sup>42</sup> In the HS2 case, the UK Supreme Court appeared to suggest that among competing constitutional provisions, there is also a hierarchical structure pertaining to the fundamentality of the underlying constitutional norm at issue. See, *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3, ¶ 207, [2014] 1 W.L.R. 324. For a detailed discussion, see Mark Elliott, *Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution* 10 (3) EUR. CONST. L. REV. 379 (2014).

The standing of human rights within the UK Constitution has served as a measure of protection against human rights reform in the form of Brexit. In *Miller* for example (discussed further below), the UK Supreme Court, partly on the basis of *Simms*, prevented the UK Government from legally notifying the EU of the UK's intention to leave without the prior authorization of Parliament. The Supreme Court perceived the European Union as an important source of domestic rights and given that Brexit will remove certain of these rights, Parliament must first expressly authorize the withdrawal notification.<sup>43</sup> For those still in doubt, the *Miller* jurisprudence highlights the nature of Brexit as a human rights reform issue.

### *B. Devolution and the Sewel Convention*

The devolved legislatures cannot amend the Human Rights Act 1998<sup>44</sup> nor can either the devolved executives or legislatures act in a manner that is incompatible with EU law or the Convention rights.<sup>45</sup> Beyond this however it is generally considered the case that the Scottish and Northern Irish legislatures have the power to legislate on human rights because it is not a matter that has been “reserved,” or in the case of Northern Ireland also “excepted,” to the Westminster Parliament.<sup>46</sup> At the time of writing, Wales operates under a conferred powers model and cannot therefore exercise a general competence on human rights, however, the Welsh Assembly has passed progressive devolved legislation that expands human rights protections (such as the Rights of Children and Young Persons Measure 2011 imposing a duty to have due regard to the UN Convention of the Rights of the Child). The Welsh constitutional arrangement is due for imminent change in April 2018 once section 3(1) of the Wales Act 2017 comes into force taking Wales to a reserved powers model.<sup>47</sup>

The devolved legislatures and the Westminster Parliament avoid stepping on each other's toes by operation of a political convention known as “Sewel”. Recently enshrined in Scottish and Welsh devolution legislation,<sup>48</sup> the Sewel Convention means that the Westminster Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislatures via a Legislative Consent Motion.<sup>49</sup> Additionally,

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<sup>43</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, ¶ 87, [2017] 2 W.L.R. 583.

<sup>44</sup> Scotland Act 1998, sch. 4; Northern Ireland Act 1998, § 7(1); Government of Wales Act 2006, sch. 5.

<sup>45</sup> See Scotland Act 1998, §§ 29, 57(2), 126; Northern Ireland Act 1998, §§ 6, 24, 81, 83, 98; Government of Wales Act 2006, §§ 81, 94, 108, 158. The interpretation sections denoted in this list stipulate that the term “Convention rights” is to be interpreted as having “the same meaning as in the Human Rights Act 1998.”

<sup>46</sup> Scotland Act 1998, § 29, sch. 5; Northern Ireland Act, §§ 5-8, and sch. 2-3.

<sup>47</sup> For the conferred powers model, see the Government of Wales Act 2006, § 108. For information regarding the implementation of Section 3(1) of the Wales Act 2017, see the Wales Act 2017 (Commencement No. 4) Regulations 2017.

<sup>48</sup> Scotland Act 2016, § 2; Wales Act 2017, § 2.

<sup>49</sup> See Memorandum of Understanding and Supplementary Agreements, 14 (Oct. 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf). See also Scotland Act 2016, § 2; Wales Act 2017, § 2; Devolution Guidance Note 8: Post-Devolution Legislation Affecting Northern Ireland, GOV.UK, (first publ. Apr. 23, 2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60983/post-devolution-primary-ni.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60983/post-devolution-primary-ni.pdf); Devolution Guidance Note 10: Post-Devolution Primary Legislation Affecting Scotland, GOV.UK (first publ. Apr. 23, 2011),

Cabinet Guidance directs that when Westminster primary legislation seeks to *alter the competences* of the devolved legislatures and of the devolved Ministers (as opposed to legislating on a devolved matter), the consent of the devolved legislature should normally be sought.<sup>50</sup>

*C. R (Miller) v. Secretary of State for Exiting the European Union*

The process by which the UK will leave the EU is set out in Article 50 TEU. According to paragraph 1, any member may leave “in accordance with its own constitutional requirements.”<sup>51</sup> In terms of EU engagement, the UK Government must first “notify” the European Council of its intent.<sup>52</sup> The EU and UK will then negotiate and conclude an agreement for withdrawal.<sup>53</sup> From the EU side, any withdrawal agreement will be concluded by a qualified majority of the Council, after obtaining the consent of the European Parliament.<sup>54</sup> In the event that no withdrawal agreement is reached within two years from the point of notification, the EU Treaties will automatically cease to apply to the UK, unless the Council and the UK unanimously decides to extend that period.<sup>55</sup> This would require each of the remaining 27 Member States to approve any extension of the two year timeline.

The applicants in *R (Miller) v. Secretary of State for Exiting the European Union* questioned the UK’s “constitutional requirements” concerning the role of Parliament, partly in relation to rights established in statute.<sup>56</sup> They argued that the prerogative power held by the UK Government to make and resile from treaties could not be legally exercised to trigger Article 50 TEU because that power does not in fact exist where its exercise would nullify or frustrate domestic law. This was particularly the case where domestic law involves rights or a scheme created by Parliament, based in part on the principle of Parliamentary sovereignty.<sup>57</sup>

The majority of the court accepted the core argument of the applicants.<sup>58</sup> Since EU law had become a source of UK domestic law by virtue of an Act of Parliament, the UK

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60985/post-devolution-primary-scotland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf) . See also, new Devolution Guidance Note: Parliamentary Assembly Primary Legislation Affecting Wales, Gov.UK (Apr. 20, 2018),

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/701462/DGN\\_-\\_Parliamentary\\_and\\_Assembly\\_Primary\\_Legislation\\_Affecting\\_Wales.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701462/DGN_-_Parliamentary_and_Assembly_Primary_Legislation_Affecting_Wales.pdf).

<sup>50</sup> See Devolution Guidance Note 8, *supra* note 49, at 4-5; Devolution Guidance Note 10, *supra* note 49, at 4-6; new Devolution Guidance Note: Parliamentary Assembly Primary Legislation Affecting Wales, *supra* note 49, at 69-70.

<sup>51</sup> Treaty on the European Union, art. 50(1), Jun. 7, 2016, 2016 O.J. (C 202) [hereinafter TEU].

<sup>52</sup> Art. 50(2) TEU.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Art. 50(3) TEU.

<sup>56</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 W.L.R. 583.

<sup>57</sup> See Transcript of Oral Argument at 18:20, *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 W.L.R. 583, <https://www.supremecourt.uk/docs/draft-transcript-thursday-161208-four-page.pdf>.

<sup>58</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, ¶ 83 [2017] 2 W.L.R. 583.

Government could only exercise its prerogative powers in the intended manner if Parliament had first made clear its intention for this to be the case.<sup>59</sup> Parliamentary sovereignty was after all “conclusively established” as “a fundamental principle of the UK constitution.”<sup>60</sup> Resting on the *Simms* jurisprudence the Court stated that:

[W]e cannot accept that, [in] . . . the 1972 Act, Parliament “squarely confront[ed]” the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.<sup>61</sup>

A key presumption underpinning the *Miller* jurisprudence was the irrevocability of Article 50 TEU,<sup>62</sup> an issue on which the Treaty is silent and which could only be finally determined by the CJEU.<sup>63</sup> That is, once a state notifies it is leaving the EU, it cannot take this notification back. It has been a point of criticism that the Supreme Court chose not to seek a preliminary reference on the revocability of Article 50 before issuing its judgment.<sup>64</sup> Incidentally, the Court was also quick to dismiss any suggestion that the EU referendum had dispensed with the requirement for Parliamentary authority.<sup>65</sup>

The UK Supreme Court was also asked in *Miller* to determine whether the Westminster legislation it had deemed to be necessary before Article 50 TEU could be triggered should be preceded by a legislative consent motion from the devolved legislatures.<sup>66</sup> Despite the Sewel Convention gaining legislative entrenchment, the Court determined that the consent of the devolved legislatures was not legally required. The rationale being that the Convention nevertheless remained of a political nature and as such “the policing and scope of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.”<sup>67</sup>

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<sup>59</sup> *Id.* at ¶ 87.

<sup>60</sup> *Id.* at ¶ 41-43.

<sup>61</sup> *Id.* at ¶ 87.

<sup>62</sup> *Id.* at ¶ 169.

<sup>63</sup> An application was filed in January 2017 by London barrister Jolyon Maugham QC with the Dublin High Court seeking a legal ruling on whether the UK (or any other Member States) can unilaterally withdraw its notification under Article 50 once made (the ‘Dublin case’). This case was however discontinued in May 2017 citing lack of Irish Government support and timing concerns. See Jolyon Maugham, *Sometimes You Try and You Do Not Succeed*, WAITING FOR GODOT (May 29, 2017), [waitingfortax.com/2017/05/29/sometimes-you-try-and-you-do-not-succeed/](http://waitingfortax.com/2017/05/29/sometimes-you-try-and-you-do-not-succeed/).

<sup>64</sup> See e.g., Philip Allott, *Taking Stock of the Legal Fallout from the EU (Notification of Withdrawal) Act 2017*, U.K. CONST. L. BLOG (Feb. 2, 2017), [ukconstitutionallaw.org/2017/02/02/philip-allott-taking-stock-of-the-legal-fallout-from-the-eu-notification-of-withdrawal-act-2017/](http://ukconstitutionallaw.org/2017/02/02/philip-allott-taking-stock-of-the-legal-fallout-from-the-eu-notification-of-withdrawal-act-2017/).

<sup>65</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, ¶ 38 [2017] 2 W.L.R. 583.

<sup>66</sup> The question was initially raised in two NI High Court applications. See McCord’s (Raymond) Application, [2016] NIQB 85, [2017] 2 C.M.L.R. 7.

<sup>67</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, ¶ 151 [2017] 2 W.L.R. 583.

The UK Government responded swiftly to the Supreme Court's decision by introducing skeletal legislation to Parliament. The European Union (Notification of Withdrawal) Act 2017 simply provides that the Prime Minister may notify, under Article 50(2) TEU the UK's intention to withdraw from the EU; and that no provision made under the European Communities Act 1972 may affect that power. Amendments made by the House of Lords during legislative passage to safeguard the rights of EU citizens' residing in the UK and to require approval of the negotiation agreement from both Houses of Parliament were rejected by the Commons.<sup>68</sup> As such the Act did not include any information on the changes to the rights framework which may arise from Brexit - a missed opportunity to engender goodwill with the EU prior to the start of the negotiations. Neither did the Act commit Parliament to rights scrutiny. Despite the higher status accorded to rights protections within the UK's constitutional framework, such rights can still be overridden by a simple Act of Parliament with express language. The sufficiency of political will within Parliament is therefore crucial to ensuring adequate rights protections within UK law. At present, despite an awareness of the issue among the parties, Parliamentary will on the matter is languishing behind the populist calls to assert national sovereignty, and is moreover being mistakenly positioned as in opposition to that objective.

## II. EU HUMAN RIGHTS LAW AND BREXIT

So what are the human rights implications of Brexit? The intention of the government has been to maintain a degree of legal certainty for UK citizens by ensuring that pre-Brexit EU law remains in force in the UK, where practicable, until such a time as it can be individually reviewed and potentially repealed.<sup>69</sup> As such, some aspects of EU law, we are told, will remain part of UK law for the foreseeable future—until such time as parliament expressly repeals it. In fact the Government's White Paper has explicitly promised to protect and enhance EU derived workers' rights.<sup>70</sup> Nonetheless, concrete proposals on how this will be achieved are yet to be provided. In addition, and on closer inspection, we can see that the impact may indeed be much more serious for human rights protections in the UK with the inevitable loss of rights and remedies derived from the much broader EU framework. In particular the rights at risk include equality provisions,<sup>71</sup> the right to a fair trial and access to justice/ effective remedies,<sup>72</sup> and the yet untapped potential reach of social rights under the

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<sup>68</sup> 13 Mar. 2017, Parl Deb HC (2017) cols. 73-82 (UK).

<sup>69</sup> DEPARTMENT FOR EXITING THE EUROPEAN UNION, THE UNITED KINGDOM'S EXIT FROM, AND NEW PARTNERSHIP WITH, THE EUROPEAN UNION, 2017, Cm. 9417, at 1.1 (UK), [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf).

<sup>70</sup> *Id.*

<sup>71</sup> UK equality law derives significantly from the EU legal framework, including the general treaty provision.

<sup>72</sup> The jurisprudence of the ECJ on remedies and Charter of Fundamental Rights of the European Union, art. 47, Jun. 7, 2016, 2016 O.J. (C 202). [hereinafter EU CFR], through cases such as, Judgment of 22 December 2010, Case C-279/09 "*DEB*" (OJ 2010 C 55, p. 9), Judgment of 18 March 2010 Case C-317-320/08, "*Alassini*", (OJ 2010 C 134, p. 3-4) and Judgment of 14 June 2011 Case C-360/09, "*Pfleiderer*" (OJ 2011 C 232, p. 5-6). The original jurisprudence of the CJEU on remedies started from the principle of national procedural autonomy with limited harmonisation. This was true subject to the principles of 'effectiveness' (national law should not make it virtually impossible to bring an EU law) and 'equivalence' (national law should not treat the EU claim any less favourably than a claim brought under national law). In the *DEB* case, the ECJ started a shift from the

solidarity framework.<sup>73</sup> Furthermore, the existing rights of non-UK EU citizens living and working in the UK who were not part of the EU referendum plebiscite now feature as a “bargaining chip” in the post-referendum negotiations.<sup>74</sup> As noted by Lock, the biggest threat to human rights as a result of Brexit is that withdrawal from the EU framework opens the door to human rights regression in all of the areas engaging with EU law.<sup>75</sup> We have consistently raised concerns that it is the threat to rights not currently protected by the ECHR, in particular socio-economic rights (and the yet untapped potential of the EU Charter) that poses the biggest loss as well as the associated remedies.<sup>76</sup>

In the *Miller* case, the Supreme Court emphasised the centrality of rights to the process of Brexit— finding that the triggering of Article 50 by notifying withdrawal from the EU would result in a fundamental change in the constitutional arrangements of the United Kingdom.<sup>77</sup> This fundamental change occurs because the process of exiting the EU results in the loss of rights and remedies deriving from EU law.<sup>78</sup>

EU rights continue to be in a state of constant flux. In fact, the ambit of the rights and remedies which are incorporated into domestic law under section 2 of the 1972 Act varies with the UK’s obligations “from time to time” under the treaties.<sup>79</sup> Their interpretation relies significantly on the jurisprudence of the European Court of Justice (ECJ). This comes as no surprise given, for example, the absence of clearly defined rights, as opposed to principles, in the European Charter of Fundamental Rights.<sup>80</sup> Relying on courts to give meaning to rights is not unusual practice and it would seem this ad hoc formation of rights through the jurisprudence of the ECJ and national courts was perhaps deliberate if not unavoidable.<sup>81</sup> De

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traditional approach towards a focus on Art. 47. In *Alassini*, the ECJ applies both approaches, ie. the principles of ‘effectiveness’ and ‘equivalence’ fi

rst and then after that, Art. 47. The nature of the jurisprudence and the tests applied under Art. 47 are different from the traditional approach to remedies. In *Pfleiderer*, the ECJ had the opportunity to apply Art. 47 but choose not to – again reflecting an oscillating jurisprudence.

<sup>73</sup> The EU CFR will not be incorporated into UK law post-Brexit.

<sup>74</sup> Ruvi Zeigler, *Logically Flawed, Morally indefensible: EU Citizens in the UK are Bargaining Chips*, BREXIT BLOG LSE (Feb. 16, 2017), <http://blogs.lse.ac.uk/brexit/2017/02/16/logically-flawed-morally-indefensible-eu-citizens-in-the-uk-are-bargaining-chips/>.

<sup>75</sup> Tobias Lock, *Human Rights Law in the UK after Brexit* 117-18 (Edinburgh Law Sch. Pub. Law, Research Paper No. 17, 2017).

<sup>76</sup> Boyle & Cochrane, *supra* note 25; Boyle & Cochrane, *Brexit and a British Bill of Rights*, *supra* note 16 at 3; Katie Boyle, *What are the consequences for human rights if we change our relationship with the EU?* THE U.K. IN A CHANGING EUROPE (Apr. 13, 2016), <http://ukandeu.ac.uk/explainers/what-are-the-consequences-for-human-rights-if-we-change-our-relationship-with-the-eu/>.

<sup>77</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, ¶ 78-81 [2017] 2 W.L.R. 583.

<sup>78</sup> *Id.* at ¶ 80.

<sup>79</sup> *Id.* at ¶ 76; European Communities Act 1972, c. 68, § 2 (UK.).

<sup>80</sup> Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375 (2012).

<sup>81</sup> *Id.* at 399.

Vries has indeed argued that the court may be “generating its own meaning” for rights.<sup>82</sup> The UK government has established a consistent line in negotiations to “bring an end” to the jurisdiction of the ECJ in Britain post-Brexit<sup>83</sup> and that the EU Charter of Fundamental Rights is not to be incorporated into UK law.<sup>84</sup> The President of the UK Supreme Court has called on parliament “to be very clear” in explaining what UK judges are to do with decisions of the ECJ or any other EU topic after Brexit, indicating that the proposed EU (Withdrawal) Bill is not yet fit for purpose.<sup>85</sup> In Scotland, the Scottish Parliament has passed legislation that seeks to protect both the Charter and the general principles of EU law meaning the courts in Scotland can continue to strike down any law or action that contravenes existing EU law in devolved areas.<sup>86</sup>

Before the referendum took place we further argued that greater attention on the implications for rights protection was required in order to support an informed and deliberative referendum process.<sup>87</sup> Others too cautioned that the discourse had not yet engaged with the vast potential consequences of Brexit on the UK constitutional framework – particularly in relation to the implications for human rights protection.<sup>88</sup>

In April 2016 we noted four areas of major concern in the post-Brexit rights landscape: (i) the loss of citizenship rights; (ii) the loss of rights derived from general principles of EU law; (iii) the loss of rights derived from EU treaties, including the loss of rights derived from the EU Charter of Fundamental Rights; and (iv) the loss of rights derived from regulations and directives which engage with human rights either directly or indirectly.<sup>89</sup> Examples of rights deriving from regulations include rights associated with the

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<sup>82</sup> SYBE DE VRIES ET AL. (EDS.), *THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT—FIVE YEARS OLD AND GROWING* (2015).

<sup>83</sup> Tobias Lock, *A Role for the ECJ After Brexit?*, EUROPEAN FUTURES FORUM (Jul. 3, 2017), [www.europeanfutures.ed.ac.uk/article-4872](http://www.europeanfutures.ed.ac.uk/article-4872) (citing the Theresa May Lancaster House speech where she promised to “bring an end to the jurisdiction of the European Court of Justice in Britain”).

<sup>84</sup> DEPARTMENT FOR EXITING THE EUROPEAN UNION, *LEGISLATING FOR THE UNITED KINGDOM’S WITHDRAWAL FROM THE EUROPEAN UNION* 2.25 (Mar. 2017).

<sup>85</sup> Clive Coleman, *UK judges need clarity after Brexit - Lord Neuberger*, BBC NEWS (Aug. 8, 2017), <http://www.bbc.co.uk/news/uk-40855526>.

<sup>86</sup> Clause 5(2)(b) of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill seeks to retain many of the rights and remedies in Scots law after withdrawal as would have been available before withdrawal, including the right of the courts to strike down legislation incompatible with the EU CFR and EU general principles. UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018-5, SP Bill [28] cl. 5 (Scot.). Nonetheless, other routes to remedy, such as access to the Court of Justice of the European Union remain uncertain.

<sup>87</sup> See Boyle & Cochrane, *supra* note 16; Boyle *supra* note 76.

<sup>88</sup> See e.g. Sionaidh Douglas-Scott, *What Happens to ‘Acquired Rights’ in the Event of a Brexit?*, U.K CONST. L. BLOG (May 16, 2016), <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/>; See also Piet Eeckhout, *The Real Record of the EU Charter of Fundamental Rights*, U.K CONST. L. BLOG. (May 6, 2016), <https://ukconstitutionallaw.org/2016/05/06/piet-eeckhout-the-real-record-of-the-eu-charter-of-fundamental-rights/>.

<sup>89</sup> For further discussion of these various categories see Boyle & Cochrane, *Rights Derived from EU Law: Informing the Referendum Process*, *supra* note 16.

coordination of national security systems<sup>90</sup> and the corresponding right to social security.<sup>91</sup> Examples of rights deriving from directives include directives on child sexual abuse,<sup>92</sup> trafficking in human beings,<sup>93</sup> data protection,<sup>94</sup> gender equality in employment,<sup>95</sup> and racial equality.<sup>96</sup> We noted that the remedies currently available under EU law for breach of an EU right will also no longer be available. Remedies include the disapplication of primary law.<sup>97</sup> This is a much stronger remedy than available under the Human Rights Act for a violation of an ECHR right.<sup>98</sup>

We argued that the consequences were so vast and potentially so far reaching that the complexity of disentangling the UK from the EU framework whilst also dealing with potential changes to the partially incorporated nature of the European Convention of Human Rights under the Human Rights Act 1998 would be incredibly problematic (if not careless). This argument was contextualised as part of a broader concern that it was becoming increasingly difficult to ensure that voters had access to the necessary information for an informed vote and that this in turn could have a significant detrimental impact on the deliberative quality of the constitutional referendum process in and of itself.<sup>99</sup> The revelations emerging in relation to Cambridge Analytica and widespread manipulation in both the US election and the UK EU referendum raise serious concerns about whether the electorate were misinformed to the extent that an informed vote was significantly impeded.<sup>100</sup> There is also a lack of clarity in post-vote negotiation process. It is entirely unclear what kind of post-Brexit rights landscape might exist and whether the UK will indeed continue to protect existing rights and if so to what extent. Inevitably some rights and remedies will be lost irrevocably – others may be protected in the immediate aftermath but could be eroded over time. There will be no obligation on subsequent administrations to retain the same level of protection that the current government might guarantee; given the nature of the UK

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<sup>90</sup> For example, Regulation (EC) 883/ 2004 of the European Parliament and of the Council (29 April 2004) on the coordination of national security systems falling within the framework of free movement of persons and contributing towards improving their standard of living and conditions of employment.

<sup>91</sup> Art. 34 EU CFR.

<sup>92</sup> Directive 2011/92/EU of the European Parliament and of the Council (13 December 2011).

<sup>93</sup> Directive 2011/36/EU of the European Parliament and of the Council (5 April 2011).

<sup>94</sup> Directive 95/46/EC of the European Parliament and of the Council (24 October 1995).

<sup>95</sup> Directive 2006/54/EC of the European Parliament and of the Council (5 July 2006).

<sup>96</sup> Council Directive 2000/43/EC (29 June 2000).

<sup>97</sup> See *R v. Secretary of State for Transport, ex p. Factortame (No 2)* [1991] 1 AC 603 at 658 – 659, [1990] 3 W.L.R. 818 (appeal taken from Eng. & Wales, reference made to E.C.J.); *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, 78, [2017] 3 WLR 957 (on appeal from Eng. & Wales); and *Google Inc v. Vidal-Hall* [2015] EWCA Civ 311, [2016] Q.B. 1003.

<sup>98</sup> See Hirst discussion *infra* Part III. The strongest remedy available under the HRA for an incompatible primary legislation is a declaration of incompatibility, which has no impact on the operative provision.

<sup>99</sup> Boyle & Cochrane, *supra* note 16; Boyle *supra* note 76.

<sup>100</sup> See Carole Cadwalladr, *The Cambridge Analytica Files*, THE GUARDIAN (Mar. 18, 2018) <https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump>.



constitution and parliament's prerogative to repeal this opens the door to regressive measures on fundamental rights.

In any event, there is no provision made for the vast array of EU derived rights in the EU (Withdrawal) Bill. The use (or abuse) of delegated legislation risks undermining parliamentary oversight even further.<sup>101</sup> The UK constitution facilitates a form of legislation which allows parliament to pass primary legislation which thereafter enables secondary legislation to be passed by the executive without the need to go through full parliamentary scrutiny. These delegated powers, also known as Henry VIII powers, can undermine parliamentary scrutiny of potential changes to the human rights regime. Whilst the EU (Withdrawal) Bill places the Human Rights Act 1998 outside the remit of delegated legislation,<sup>102</sup> the vast array of rights derived from other sources of EU law are not guaranteed by this exemption. Notably the same exemption is not applied to the Equality Act 2010 which largely implements the EU equality related directives.

Nonetheless, the EU human rights framework will most likely retain continuing relevance. As part of the negotiation process the EU may seek to ensure that any future agreement with the UK does not compromise its own human rights standards. This has often formed a prerequisite of negotiation with third country agreements with other countries outside of the EU.<sup>103</sup> It may form part of a prerequisite for future trade negotiations.<sup>104</sup> Whilst the general ambivalence towards social rights in the EU is evident,<sup>105</sup> there is also a need to reflect on the fact that the Charter places civil and political rights on the same footing as economic and social rights – even if this equality is more “apparent than real.”<sup>106</sup> That is not to say the direction of the court may not change in the future – particularly with the introduction of the EU Social Rights Pillar. The EU may therefore have a role to play in guiding the direction of the UK in terms of upholding existing rights and remedies in so far as it is possible to do so.

The position of the UK signals to the international arena a disregard (if not, a careless approach) towards EU and national citizenship in terms of the domestic enforcement and continued protection of rights. This position undermines the UK on the global stage as concessions are made to assuage nationalist demands at the expense of global relationships. The UK has been subject to scrutiny by UN bodies concerned with the hate filled political rhetoric leading the domestic charge against minority groups, which have resulted in a spike

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<sup>101</sup> See the evidence session to House of Lords Constitutional Committee, PARLIAMENTLIVE.TV, (Feb. 1, 2017), <http://parliamentlive.tv/event/index/75194d6a-b303-436b-8bd8-e4b1dec58b3f>.

<sup>102</sup> European Union (Withdrawal) Bill 2017-8, HC Bill [5] cl. 8, 9, 12 and 21 (UK).

<sup>103</sup> LORAND BARTELS, HUMAN RIGHTS AND DEMOCRACY CLAUSES IN THE EU'S INTERNATIONAL AGREEMENTS, EUROPEAN PARLIAMENT (2005), [www.europarl.europa.eu/meetdocs/2004\\_2009/documents/nt/584/584520/584520en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/584/584520/584520en.pdf).

<sup>104</sup> Joint Committee on Human Rights, *supra* note 17, at 9.

<sup>105</sup> As discussed by Catherine Barnard, *The Silence of the Charter: Social Rights and the Court of Justice*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT—FIVE YEARS OLD AND GROWING 173 (Sybe de Vries et al. eds., 2015).

<sup>106</sup> *Id.*

in hate crimes around the referendum.<sup>107</sup> In the literature, Crawford has highlighted the emerging global trend of states retreating from the global sphere by withdrawing from international treaties, such as is the case of Brexit, the US withdrawal from the Paris Agreement and South Africa's purported withdrawal from the Rome Statute.<sup>108</sup> These emerging trends speak to the fragility of international law and the backlash against globalisation.<sup>109</sup> Nonetheless, as Crawford identifies, withdrawal, or a retreat from supranational mechanisms, still requires a role for a supranational dispute resolution.<sup>110</sup> In the case of Brexit, the rejection of the jurisdiction of the Court of Justice of the European Union "will have to be replaced by something because there will continue to be a collection of rights and regimes that exist to govern relations between the EU and the UK."<sup>111</sup> In this sense there is simply no way of fully retreating as an actor on the global stage. The UK will continue to be subject to rules and regulations governing its relationship with the EU regardless of what demands are placed domestically.

The conclusion therefore is that the picture is much more complex than a simple repeal and replace scheme. The danger is that the current trajectory risks sleepwalking into a human rights legal deficit with many EU rights swept away with inadvertent measures or deliberate erosion. Yet again, we highlight the importance of genuine and informed deliberation of the consequences of Brexit on existing rights and remedies. More so we emphasise the potential impact that such a loss will have on those rights holders who are no longer able to seek a remedy for a breach of EU derived human rights law when this source of law has for decades provided a constitutional pillar of the domestic rights regime. This is a constitution in transition without the appropriate safeguards in place.

#### *A. Devolution and Brexit*

The futility of the Sewel Convention's legislative entrenchment as seen in the *Miller* case is a frustrating addition to already unhappy relations between, in particular, the Scottish and UK Governments. The Prime Minister has committed that no decisions currently taken by the devolved administrations will be removed and that they will be fully involved in the

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<sup>107</sup> Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/GBR/CO/21-23 at ¶ 15 (Aug. 2016). The UN Committee on the Elimination of Racial Discrimination raised concerns about the spike in hate crimes associated with the referendum noting that the referendum campaign was marked by 'divisive, anti-immigrant and xenophobic rhetoric, and that many politicians and prominent political figures not only failed to condemn such rhetoric, but also created and entrenched prejudices, thereby emboldening individuals to carry out acts of intimidation and hate towards ethnic or ethno-religious minority communities and people who are visibly different.

<sup>108</sup> James Crawford, *The Current Political Discourse Concerning International Law*, 81 MODERN LAW REV. 1, 22 (2018).

<sup>109</sup> *Id.* at 2. See also e.g. RICHARD HAASS, A WORLD IN DISARRAY: AMERICAN FOREIGN POLICY AND THE CRISIS OF THE OLD ORDER (2017).

<sup>110</sup> Crawford, *supra* 108, at 17.

<sup>111</sup> *Id.*

Brexit process.<sup>112</sup> However, the return of EU competencies does not necessarily mean that the devolved competence will expand on a ‘repatriation’ of power from Europe. Similar to the potential use (or abuse) of delegated legislation enabled through the EU (Withdrawal) Bill, the devolved legislatures may not have much say in where this power goes even for those areas within their existing devolved competence, not least because the Sewel Convention does not apply even in a political sense to secondary legislation. As the legislation passes through Parliament, attempts have been made to ‘assuage’ the devolved legislatures by affording the repatriation of powers to the devolved legislatures a statutory footing.<sup>113</sup>

What has been apparent is that Brexit poses major constitutional challenges to the future of the UK as a unitary state. In the *Miller* judgment the Court referred to Dicey in describing the UK constitution as “the most flexible polity in existence.”<sup>114</sup> Likewise, the UK Government suggests in its White Paper on Brexit that the UK’s constitutional framework reflects the unique circumstances of the world’s most successful and enduring multi-nation state.<sup>115</sup> Yet constitutional unrest is becoming ever more evident in the devolved jurisdictions. Following an unsuccessful attempt in 2014, the UK-wide decision to leave the EU, which was not supported by the majority in Scotland, prompted the Scottish Government to call for a second referendum on independence, a plan that has been postponed on the back of Scottish National Party losses to pro-Union parties in the 2017 General Election.<sup>116</sup>

Further, there is a need to resolve border issues with Ireland post-Brexit in a manner that does not destabilize Northern Ireland’s peace settlement: issues which have proven central to Brexit discussions so far and will remain of enduring concern.<sup>117</sup> Any retrogression on human rights in Northern Ireland could be a fatal blow to the fragile peace arrangement and contrary to the foundations of the Good Friday Agreement human rights framework. The fragility of this position is further underscored by the fact that Northern Ireland has been without an effective Executive since January 2017 due to domestic discord (underpinned by enduring political tensions) over where the responsibility lies regarding a failed clean energy scheme resulting in significant losses to the public purse.<sup>118</sup> While both the Scottish and Welsh Governments have proactively published White Papers on Brexit, albeit that certain

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<sup>112</sup> Theresa May, Prime Minister, The government's negotiating objectives for exiting the EU, (Jan. 17, 2017), <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

<sup>113</sup> The Government has proposed an amendment to the Bill with the intention of reassuring the devolved legislatures that most of the EU powers in devolved areas will be transferred to the devolved jurisdictions after withdrawal. David Cornock, *Brexit, devolution, the House of Lords & Waldo Williams*, BBC NEWS, (Mar. 22, 2018), <http://www.bbc.co.uk/news/uk-wales-politics-43499314>.

<sup>114</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 ¶ 40, [2017] 2 W.L.R. 583.

<sup>115</sup> UK GOVERNMENT (Cm 9417), *supra* note 69.

<sup>116</sup> Severin Carrell, *Nicola Sturgeon shelves second Scottish independence referendum* (video), THE GUARDIAN (June 27, 2017), [www.theguardian.com/politics/2017/jun/27/nicola-sturgeon-shelves-second-independence-referendum](http://www.theguardian.com/politics/2017/jun/27/nicola-sturgeon-shelves-second-independence-referendum).

<sup>117</sup> For a discussion of issues, see e.g. Colin Murray et al., *Discussion Paper on Brexit* (2018), [http://www.nihrc.org/uploads/publications/Discussion\\_Paper\\_on\\_Brexit.pdf](http://www.nihrc.org/uploads/publications/Discussion_Paper_on_Brexit.pdf).

<sup>118</sup> An Inquiry into the matter was announced on January 24, 2017. See RENEWABLE HEAT INCENTIVE INQUIRY, <https://www.rhiinquiry.org/>.

suggestions such as Scotland staying within the single market have been rejected by the UK Government,<sup>119</sup> the people of Northern Ireland are largely reliant upon the UK and Irish Governments to assert their interests rather than any local representation. This includes a disproportionate emphasis on the DUP position which receives significant weight as part of the Conservative DUP coalition but does not represent the broad spectrum constituting the polarised political makeup of Northern Ireland. The constitutional climate is such that despite the blow dealt by *Miller* to any legal requirement to obtain consent from the devolved legislatures, a prudent UK Government seeking to solidify the unitary arrangements would regard genuine dialogue and the Sewel arrangement of utmost political and practical importance. At the time of writing, the UK Government has tabled amendments to the EU (Withdrawal) Bill that seek to assuage devolved concerns about the repatriation of EU competences by introducing a ‘consent decision’ mechanism before the UK Government can pass Regulations engaging with hitherto devolved areas under EU law. Whilst this might appear a positive move, it is a procedural requirement with no real substantive bite. In other words – even if the devolved legislatures do not consent – once the consent decision is issued (whether consensual or non-consensual), the Regulations can lawfully be passed. Scotland has rejected this approach. It has attempted to mitigate the damage of a difficult Brexit by passing the European Union (Legal Continuity) (Scotland) Bill. This legislation seeks to retain the force of EU law in devolved areas, including retaining many of the rights and remedies in Scots law after withdrawal as would have been available before withdrawal. This include the right of the courts to strike down legislation incompatible with the Charter and EU general principles when engaging with EU retained law (clause 5(2)(b)). This, in and of itself, has now been regarded as usurping Westminster parliamentary supremacy and a legal challenge to the Scottish legislation is on the horizon (on the grounds that it is beyond the competence of the Scottish Parliament to legislate to this effect).

### III. REPEAL OF THE HUMAN RIGHTS ACT AND A BRITISH BILL OF RIGHTS

Political and academic discussion on the second human rights reform process has been notably more muted since the UK Westminster election of June 2017. In 2015, the Cameron Government, elected with a majority, achieved a political mandate for its pledge to “scrap the [Human Rights Act 1998] and introduce a British Bill of Rights.”<sup>120</sup> Theresa May, a long-time critique of the Act and the European Convention on Human Rights, readily inherited this commitment, and until early 2017 consultation proposals toward that end were awaited.<sup>121</sup> According to the Conservative Party’s 2017 Manifesto, which preceded the snap election in June, the UK Government no longer intend to repeal or replace the Human Rights Act “while the process of Brexit is underway” but promise to “consider [the] human rights

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<sup>119</sup> Letter from David Davis MP, Secretary of State for Exiting the European Union, to Michael Russell MSP, Minister for UK Negotiations on Scotland’s Place in Europe (Mar. 29, 2017), [www.parliament.scot/S5\\_European/General%20Documents/CTEER\\_Minister\\_M.Russell\\_2017.04.27.pdf](http://www.parliament.scot/S5_European/General%20Documents/CTEER_Minister_M.Russell_2017.04.27.pdf).

<sup>120</sup> The Conservative Party Manifesto 2015 at 73. *See also* CONSERVATIVES, PROTECTING HUMAN RIGHTS IN THE UK – THE CONSERVATIVES’ PROPOSALS FOR CHANGING BRITAIN’S HUMAN RIGHTS LAWS (2014), [www.conservatives.com/~media/files/downloadable%20files/human\\_rights.pdf](http://www.conservatives.com/~media/files/downloadable%20files/human_rights.pdf).

<sup>121</sup> *See former Justice Secretary Liz Truss interview*, BBC RADIO 4 (Aug. 22, 2016), <http://www.bbc.co.uk/programmes/b07pd4kj>. It first appeared the proposal to repeal the Human Rights Act would receive a temporary stay in January 2017. *See* comments of Sir Oliver Heald, Justice Minister, HC Deb, January 24, 2017, Vol 620, Col 153.

legal framework when the process of leaving the EU concludes.”<sup>122</sup> While this turn of events explains the recent reduction in discussion concerning the potential repeal of the Human Rights Act, criticism of the Act remains an issue of immediate concern. The negativity and oscillation surrounding the UK’s human rights legal framework gives the impression, rightly or wrongly, of a Government intent on undermining the current level of human rights protection. In the very least it is stifling progress as civil society organisations redirect their efforts to maintaining the status quo as opposed to re-imagining a more progressive legal framework.

As discussed in the introduction, a core discourse underpinning the proposed repeal of the Human Rights Act is the repatriation of sovereignty. It is, in fact, an often celebrated aspect of the Human Rights Act that it accords structural respect to parliamentary sovereignty, and in turn the will of the UK electorate as expressed through representative democracy. The Human Rights Act 1998 came into force in 2000 for the purpose of incorporating most of the rights contained within the European Convention on Human Rights into domestic law. It functions as the core of the UK’s human rights scheme and is the primary domestic instrument utilized by the Westminster to enhance human rights protection.<sup>123</sup> Since it incorporates rights contained within the European Convention on Human Rights, it is an instrument that protects essentially civil and political rights (the European Court of Human Rights has stipulated that these rights can have implications of a social or economic nature given the indivisible nature of rights).<sup>124</sup> The effort to respect parliamentary sovereignty manifests in particular in how the statute deals with legislation through sections 3 and 4 of the Act.

Section 3 of the Human Rights Act requires courts to interpret legislation in a manner that is compatible with European Convention rights in “so far as it is possible to do so.” Where this is not deemed possible, section 4 provides that the courts (High Court and above) can make a “declaration of incompatibility” between UK primary legislation and the Convention. As such, the legal validity of the primary legislation remains intact, unlike with secondary legislation, which the courts may strike down. This model of rights protection applied by the Act is commonly conceived as a hybrid which sits somewhere between a model which rests all the powers of adjudication in the courts with one where the legislature has the final say on rights matters.<sup>125</sup> There is also a substantial body of literature which complements the ‘dialogue’ encouraged between the legislature and the courts by sections 3 and 4 of the Act. Indeed, a significant benefit said of dialogic models is their ability to

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<sup>122</sup> The Conservative and Unionist Party Manifesto 2017 at 37.

<sup>123</sup> See UK GOVERNMENT, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, ch. 1 (1997, Cm 3782).

<sup>124</sup> See e.g. *Stec v. UK*, [2005] Eur. Ct. H.R. 321 at 52.

<sup>125</sup> The approach of the Act has been said to sit between the political constitutionalism/legal constitutionalism dichotomy and has been called a ‘parliamentary bill of rights,’ ‘statutory bill of rights,’ ‘weak form judicial review’ as well as the ‘new commonwealth model of constitutionalism.’ See e.g., JANET HIEBERT & JAMES B. KELLY, *PARLIAMENTARY BILLS OF RIGHTS: THE EXPERIENCES OF NEW ZEALAND AND THE UNITED KINGDOM* (2015); JAMES ALLAN, *Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About - Doin’ the Sankey Hanky Panky*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* (Tom Campbell et al. eds., 2011); JEREMY WALDRON, *The Core of the Case against Judicial Review*, in *POLITICAL POLITICAL THEORY* (2016); STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

facilitate public deliberation and debate. Interactions between the courts and the legislature can for example serve to highlight a matter in the public domain.<sup>126</sup>

The most detailed account of the criticisms levelled against the Human Rights Act can be found in the February 2016 evidence delivered by the then Justice Secretary Michael Gove to the House of Lords EU Committee Inquiry on the proposed repeal and introduction of a new British Bill of Rights.<sup>127</sup> Based on this evidence which contains relatively minor alterations, along with the Minister's comment that human rights have developed "a bad name in the public square" due to associations with claims by "unmeritorious individuals" and with "foreign intervention" on British courts,<sup>128</sup> the EU Committee rightly concluded that the motivations behind repealing the Human Rights Act were directed at ensuring human rights had a greater national identity rather than increasing human rights protection in the UK. The Committee expressed that it was not clear "why a British Bill of Rights was really necessary," nor was it clear how a British Bill of Rights would address the Justice Secretary's concerns any more than the Human Rights Act.<sup>129</sup>

Considering the enormity, both in symbolic and constitutional terms, of the action of repealing the Human Rights Act, it might be stressed just how minor the Government's expressed concerns were. The substantive changes suggested by Gove involve three possible clarifications to the law as it stands. First, it was proposed that a British Bill of Rights would ensure that the jurisprudence of the European Court of Human Rights is advisory only. Section 2 of the Human Rights Act presently requires that domestic courts "take into account" relevant Strasbourg jurisprudence and opinion. This requirement was interpreted in 2004 by the House of Lords as a 'mirror' principle, meaning that section 2 was to be read as having placed a "duty [on] national courts [...] to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."<sup>130</sup> The domestic courts have however since distanced their approach from this position, interpreting section 2 as instead requiring something more akin to *consideration* of the Strasbourg position.<sup>131</sup> When queried therefore by the Committee on the continuing relevance of this suggestion, the Justice Secretary expressed a desire to avoid future courts returning to the 'mirror' interpretation. The second substantive change proposed was a specific derogation from Convention rights in times of war. Derogations from Convention rights are already permitted under Article 15 of the Convention with the proviso that it is 'to the extent strictly required

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<sup>126</sup> For discussion see Sandra Fredman, *From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote*, in PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT 152-156, 296-297 (2015); ALISON YOUNG, DEMOCRATIC DIALOGUE AND THE CONSTITUTION (2017).

<sup>127</sup> For a summary of the Gove evidence, see HOUSE OF LORDS EU COMMITTEE, *supra* note 18, ch. 3.

<sup>128</sup> See Michael Gove evidence, EU COMMITTEE, *Inquiry into 'The Potential Impact on EU Law of Repealing Human Rights Act'* (Feb. 2, 2016), Q 79-90, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.html>.

<sup>129</sup> HOUSE OF LORDS EU COMMITTEE, *supra* note 18, at 46 & 49.

<sup>130</sup> *R v Special Adjudicator ex p Ullah* [2004] UKHL 26 at 20, [2004] 2 A.C. 323 (appeal taken from Eng. & Wales).

<sup>131</sup> For an overview, see BRICE DICKSON, HUMAN RIGHTS AND THE UNITED KINGDOM SUPREME COURT, 39-43 (2013).

by the exigencies of the situation’ and with a blanket prohibition on derogating from certain articles such as those prohibiting torture and slavery. Based on both prior and subsequent Government statements, the underlying desire to derogate is focused on British troops in overseas combat zones and is derived from concerns over the application of extraterritoriality to the Convention by Strasbourg.<sup>132</sup> Yet it is difficult to understand how what has since been espoused as a formal ‘presumption to derogate’ from the European Convention in times of war, relates or affects the current operation of Article 15.<sup>133</sup> Indeed, in October 2016 the UK Government formally announced its intention with the qualification that this is “if possible in the circumstances that exist at that time.”<sup>134</sup> The final substantive clarification expressed in evidence concerned a proposed adjustment of the balance accorded to the qualified rights. This meant, for example, placing more emphasis on freedom of expression than the right to privacy; such modifications were referred to as ‘glosses’ and said to better mimic the difference in approach between the UK and continental jurisdictions.<sup>135</sup>

Although the focus of the Justice Secretary’s evidence was to give more control to British courts vis-a-vis the Strasbourg court, a significant, if not predominant feature of the proposals, was to give more control to Parliament.<sup>136</sup> Yet despite a number of earlier creative interpretations under section 3,<sup>137</sup> the practice of the domestic courts is generally considered to be respectful of the doctrine of parliamentary sovereignty. In Dickson’s comprehensive review of the UK Supreme Court he refers to the “sense” that the judiciary prefer to issue incompatibility declarations which do not change the law over section 3 compatible interpretations which would directly contradict the wording of the legislation.<sup>138</sup> As a whole, the judiciary is cognisant of the democratic arguments and deferential to the views of the legislature. A more curious observation is that Parliament, as a whole, has not been challenging the judicial determination on rights. Since the Human Rights Act came into force in October 2000 until the end of July 2017, the UK Government reports 25 final (i.e. not the subject of further judicial proceedings) declarations of incompatibility issued by UK

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<sup>132</sup> See Conservatives (2014), *supra* note 120, at 7; MINISTRY OF DEFENCE, ‘GOVERNMENT TO PROTECT ARMED FORCES FROM PERSISTENT LEGAL CLAIMS IN FUTURE OVERSEAS OPERATIONS’ (Oct. 4, 2016), [www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations](http://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations). Note, however, that Gove’s evidence drew potential parallels with the French Government’s Convention derogations in the aftermath of the Bataclan tragedy occurring on French soil. For information on that derogation see COUNCIL OF EUROPE SECRETARY GENERAL, PRESS RELEASE (Nov. 25, 2015), [www.coe.int/en/web/secretary-general/news-2015/](http://www.coe.int/en/web/secretary-general/news-2015/). Article 15(2) ECHR however states: “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”

<sup>133</sup> *Id.* (Ministry of Defence). Evidence submitted to the Joint Committee on Human Rights Inquiry in 2017 into the proposed derogation can be located at <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/>

<sup>134</sup> *Id.* (Ministry of Defence).

<sup>135</sup> HOUSE OF LORDS EU COMMITTEE, *supra* note 18, ch. 3.

<sup>136</sup> See e.g. Conservatives (2014), *supra* note 120, at 4 & 6.

<sup>137</sup> For a common example, see *Ghaidan v Godwin-Mendoza*, [2004] UKHL 30; [2004] 2 AC 557, which gave tenancy rights to unmarried gay couples despite the legislation applying only to married couples.

<sup>138</sup> Dickson (2013), *supra* note 131, at 376-77. Nor do domestic courts commonly strike down secondary legislation.



courts. As of July 2017, of these 25, 20 have been remedied or are in the process of remedy, while 5 are under consideration as to how to remedy.<sup>139</sup> One reason for such a high uptake of judicial recommendations could be the force behind the ‘ultimately binding nature’ of the Convention, and the availability of the European Court of Human Rights as an alternative forum for remedy.<sup>140</sup> Another reason could be the simple fact that the issues raised by the incompatibility declarations relate to matters not initially considered in the development of the legislation.

One somewhat infamous declaration of incompatibility that had, until recently, remained outstanding with little agreement between the UK Parliament and both the domestic and European courts, concerned the blanket ban on prisoner voting under section 3 of the Representation of the People Act 1983. In *Hirst v UK (No. 2)*, 2005-IX Eur. Ct. H.R. 187, the European Court of Human Rights determined a blanket ban on prisoner voting rights to be incompatible with the right to vote as protected by Article 3 of Protocol 1 of the Convention. The UK courts have likewise issued a declaration of incompatibility in a series of cases under section 4 of the Human Rights Act.<sup>141</sup> After over a decade of delay, the UK Government has only recently come to an arrangement that will likely gain the approval of the legislature and which the Council of Europe has accepted as addressing the incompatibility. In a fairly limited expansion of voting rights, prisoners under home detention curfew and certain prisoners back in the community on license should soon be able to vote.<sup>142</sup> The prisoner voting saga, which is likely to resolve with the reality of an increase of approximately 100 additional prisoners with voting rights on any given day,<sup>143</sup> portrays a tenacious legislature with the capacity to hold a position in opposition to judicial rights rulings should it feel compelled to do so.

In sum, the UK Government’s Human Rights Act proposals, such as we understand them, appear then to be directed at increasing parliamentary control of human rights. Yet the above discussion understands the Human Rights Act as structurally respectful of parliamentary sovereignty and in practical terms notes the strength of Parliament should it choose to defy international courts.<sup>144</sup> Furthermore, it might be considered ironic that the proposals in so far as they might suggest a more restricted role for the judiciary in rights adjudication, may serve to decrease public involvement in rights deliberations. That is

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<sup>139</sup> MINISTRY OF JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS: REPORT TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE GOVERNMENT’S RESPONSE TO HUMAN RIGHTS JUDGMENTS 2016-17, Annex A (Dec. 2017, Cm 9535), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/669445/responding\\_to\\_human\\_rights\\_judgments\\_2016-17.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/669445/responding_to_human_rights_judgments_2016-17.pdf).

<sup>140</sup> See Mark Elliott, *Beyond the European Convention: Human Rights and the Common Law*, 68 CURRENT LEGAL PROBLEMS 85, 111 (2015).

<sup>141</sup> See e.g. *Smith v Scott*, [2007] CSIH 9.

<sup>142</sup> Ministry of Justice (Cm 9535), *supra* note 139, at 44 (Annex A).

<sup>143</sup> HC Deb, 30 January 2018, Written Question 124158.

<sup>144</sup> For a further discussion and the additional argument that a repeal of the Human Rights Act as proposed will actually ‘increase foreign engagement with British ‘sovereignty’ not diminish it’ due to the continuing availability of taking a case directly to the Strasbourg court, see CONOR GEARTY, ON FANTASY ISLAND, 191 (2016).



because on one view, as the domestic judicial role is restricted, any push into the public domain which occurred by virtue of the dialogic nature of rights adjudication in the UK is limited.<sup>145</sup> It might of course be countered that greater public involvement in rights issues could also occur if elected representatives are empowered by the proposed reform to take on a stronger leadership role. In reality, both these suggestions actually cloud an unresolved concern of human rights law globally, particularly with respect to its theoretical underpinnings.

The origins and foundations of international human rights law have been discussed at length in the literature. For the purposes of this article, it is sufficient to note that human rights theory is unresolved on the level of acceptable political contestation. The recognition within the Universal Declaration on Human Rights – a document invoked by the preamble to the European Convention of universal rights based on human dignity – is traditionally understood to be based on the Enlightenment period natural law interpretation of the nature of human beings.<sup>146</sup> The result is that human rights are commonly considered to be self-evident truths deducible by human reason and taken to exist *a priori* to the political sphere. If they pre-exist the political then they cannot be the subject of political contestation. However, it has become increasingly common in recent years for human rights theorists to argue for a more pragmatic justification based on a pluralist understanding of human rights.<sup>147</sup> A common thread within these arguments concerns the difficulties of separating human beings from their socially situated contexts, and the limited ability of human reason, due to the roles played by traditions and emotion, to discern *a priori* rights should they exist.<sup>148</sup> The point is that contemporary UK human rights law, which is at least partially based on the Universal Declaration, would equally benefit from clearer theoretical underpinnings. It is this issue more than any other that will aid resolution on the question of the appropriate role of politics and contestation in human rights law.

Furthermore, although it has been emphasised throughout this section, it is necessary to repeat in a more direct manner that the Human Rights Act is a civil and political rights statute. The European Convention was only a first step towards the realisation of the rights expressed within the Universal Declaration, and the UK has made limited progress at the national level towards incorporating the Declaration's socio-economic rights into its explicit

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<sup>145</sup> See e.g. (in the context of the Canadian Charter), Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)*, 350 OSGOODE HALL L.J. 75 (1997).

<sup>146</sup> See e.g. CONOR GEARTY, CAN HUMAN RIGHTS SURVIVE (2006) 26, 75; STEPHEN SEDLEY, ASHES AND SPARKS: ESSAYS ON LAW AND JUSTICE (2011) 291 (on ECHR); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007) 17 (on ECHR); JAMES GRIFFIN, ON HUMAN RIGHTS (2008) 13; Anthony Langlois, THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST THEORY (2001) 80; see also the French Declaration on the Rights of Man and Citizen (1789), which talks of the 'imprescriptible natural rights' of all human beings; American Declaration of Independence 1776.

<sup>147</sup> See e.g. Gearty, *supra* note 146, at 39 (pointing also to Amartya Sen); LINDA HOGAN, KEEPING FAITH WITH HUMAN RIGHTS (2015).

<sup>148</sup> See e.g. the well-known communitarian critiques of CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989) and ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981).

human rights artillery. Yet in today's United Kingdom, it is issues such as housing, health and social care provision which dominate the public concern and policy discourse. Increasingly, eminent figures in UK public life are calling for the recognition of values that are responsive of socio-economic and community orientated needs, in addition to the traditional core principles of democracy, the rule of law, and liberty.<sup>149</sup>

From the above, it might therefore be argued that the repatriation of sovereignty discourse which underpins the desire to repeal the Human Rights Act is a misdirected frustration at other more legitimate topics within UK human rights law and human rights law globally. The consideration promised by Theresa May of UK human rights law post-Brexit is not, as such, a bad thing. What is suggested is that the consideration of UK human rights law should be more fundamental and comprehensive than that proposed by the Government to the EU Committee back in 2016. It should be a consideration of the foundations upon which UK human rights law should stand and a genuine effort to develop legislation which reflects the contemporary concerns of what it means to have human dignity in the UK today. A post-Brexit timing will better ensure that adequate Government resources are available to inform, deliberate and interrogate the potential options. Given the exponential influence wielded by state authorities in directing the public mood, the Government has a significant role to play in the provision of accurate information to ensure no undue manipulation of this reform process and avoid giving human rights "a bad name in the public square." Certainly the process should not be focused on sliding back human rights protections, but rather, should be forward looking and try to improve their protection.

#### *A. Devolution, repeal of the Human Rights Act and a British Bill of Rights*

One of the greatest issues concerning any potential repeal of the Human Rights Act is the risk it could pose in undermining the Northern Ireland peace settlement. The Good Friday Agreement 1998 is committed to by the UK and Irish Governments in an international treaty lodged with the UN, and promises the incorporation of the European Convention and direct access to the courts for Convention breaches.<sup>150</sup> It is also the view in many quarters that an indigenous Bill of Rights for Northern Ireland has been outstanding for almost twenty years; a view that emanates from provisions within the Agreement.<sup>151</sup> Calls for a Northern Ireland Bill of Rights have grown stronger in the wake of efforts to progress a British Bill of Rights,<sup>152</sup> and it is of note that the Northern Ireland Bill of Rights proposals drawn up by the Northern Ireland Human Rights Commission also contain many more rights than are currently protected under the ECHR or EU system (including better protection of economic, social and cultural rights). The proposals to repeal the Human Rights Act and establish a British Bill of Rights therefore have the potential to cause serious constitutional and political

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<sup>149</sup> See generally, e.g., JUSTIN WELBY, REIMAGINING BRITAIN: FOUNDATIONS FOR HOPE, 58 (2018).

<sup>150</sup> Northern Ireland Peace Agreement, Good Friday Agreement 1998, Strand Three, available at <https://peacemaker.un.org/uk-ireland-good-friday98>. See Joint Statement of IHREC and NIHRC, THE NORTHERN IRELAND HUMAN RIGHTS Commission (Jun. 25, 2015), <http://www.nihrc.org/news/detail/joint-statement-of-irish-human-rights-and-equality-commission-and-northern>

<sup>151</sup> Good Friday Agreement 1998, Strand Three.

<sup>152</sup> See Anne Smith et al., *Does Every Cloud Have a Silver Lining?: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights*, 40 (1) FORDHAM INTL. L.J. 79 (2016).

disruption for Northern Ireland in exchange for what appears to be a limited benefit in terms of rights protections.<sup>153</sup>

More generally, there has been a clear divergence of trajectories across the UK in terms of the protection of human rights. In Scotland, there is a commitment to an extended version of socio-economic rights protection and a new power has been devolved to Scotland which will allow the Scottish Parliament to enforce a socio-economic equality duty in devolved matters. The new duty, now called the Fairer Scotland Duty, comes into force in April 2018.<sup>154</sup> In January 2018, the Scottish Government also took proactive steps to advance human rights protections by establishing an Advisory Group to the First Minister.<sup>155</sup> The socio-economic equality duty power has also been devolved to Wales under the Wales Act 2017 and will commence alongside the reserved powers model in April 2018.<sup>156</sup> And despite the lack of general competence thus far under the Welsh devolution arrangements, the Welsh Assembly has been able to develop legislation which actually increases the protection of human rights by incorporating a duty to have due regard to the UN Convention on the Rights of the Child, an action that has been influential in other devolved regions.<sup>157</sup>

The strongest political case for a legislative consent motion rests with the establishment of any *new* human rights framework, such as a British Bill of Rights. This is because (i) human rights are a devolved matter and (ii) a new British Bill of Rights would inevitably alter the competences of the devolved Ministers and legislatures.<sup>158</sup> Yet what can be taken from the above discussion is that each of the devolved regions is on a very different human rights trajectory, with Scotland and Wales in particular making moves towards stronger enforcement, and Northern Ireland presenting its own unique complexities. Constitutional reform at the national level that seeks to make only minor changes in a constitutionally significant way may not be enough to solve the diverging trajectory issue. If national reform is not progressive in terms of underpinning human dignity and embracing broader socio-economic rights, it risks “further fragmenting an already fragmented UK and

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<sup>153</sup> HOUSE OF LORDS EU COMMITTEE, *supra* note 18, at 183.

<sup>154</sup> (Scotland) Act 2016 § 38. The Scottish Government completed a consultation on bringing the power into operation in November 2017, *see* GOVERNMENT OF SCOTLAND, CONSULTATION ON THE SOCIO-ECONOMIC DUTY: ANALYSIS OF RESPONSES (Nov. 2017), <http://www.gov.scot/Resource/0052/00527914.pdf>. The duty was first established under the Equality Act 2010, section 1 but was never commenced.

<sup>155</sup> *See* GOVERNMENT OF SCOTLAND, AMBITION ON HUMAN RIGHTS (Jan. 17, 2018), <https://news.gov.scot/news/ambition-on-human-rights>.

<sup>156</sup> The Wales Act 2017 § 45; and The Wales Act 2017 (Commencement No. 4) Regulations 2017, *available at* [http://www.legislation.gov.uk/uksi/2017/1179/pdfs/ukxi\\_20171179\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/1179/pdfs/ukxi_20171179_en.pdf).

<sup>157</sup> Children and Young Persons (Wales) Measure 2011. This was made possible through the conferred power on social welfare which included securing the rights of children. *See* The National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 W.S.I. 2008/3132. *See also*, Children and Young People (Scotland) Act 2014 §§ 1 & 2.

<sup>158</sup> Note that arguments also exist that a legislative consent motion is required to repeal the Human Rights Act 1998, *available at* [https://www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga\\_19980042\\_en.pdf](https://www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga_19980042_en.pdf).

could potentially leave those living in England with even less access to rights or remedies compared to” the UK’s other constituent parts.<sup>159</sup>

## CONCLUSION

The constitutional character of both the Human Rights Act 1998, the European Communities Act 1972 and the devolved statutes are now well-established pillars of the UK domestic constitution and together form a critical foundational framework for fundamental rights in the UK. The common law, while recently reasserting itself as another source of rights protection,<sup>160</sup> is not sufficient to substitute the pillars of the long established European frameworks.<sup>161</sup> Worryingly the UK risks sleepwalking into a legal deficit with the Brexit process potentially sweeping away, either inadvertently or deliberately, the existing EU human rights regime without adequate parliamentary scrutiny.

The UK must take time to assess the potential pitfalls and introduce appropriate safeguards when engaging with constitutional and human rights reform, not least in relation to the sanctity of the nation state in and of itself. Interestingly the withdrawal from European legal frameworks by the UK demonstrates that it is not just a matter of renegotiating relationships at a supra-national level. Pursuing constitutional reform also requires careful consideration of the impact on each of the constitutional components of the nation at the sub-national level. The UK devolved entities each carry their own distinct constitutional character. Failure to take these positions into account could be perilous – particularly in the context of the Scottish independence debate and the Northern Ireland peace process.

The proposal to revisit the future of human rights in the post-Brexit landscape need not however be viewed entirely negatively. Taking the above cautionary warnings into account, there is the possibility of increasing the accessibility and public understanding of UK human rights law by opening the debate for genuine informed, participative and inclusive deliberation on potential reform creating a space for ownership of human rights amongst the UK public. Many believe that the constitutional principle of the rule of law includes a commitment to human rights and future reform should present as an opportunity to ask to what extent human rights protections might be increased rather than diminished. There could be, for example, an opportunity to genuinely embrace stronger protections for social rights – something which is already happening at the devolved level. We propose therefore that the opportunity to re-imagine a constitutional settlement for rights across the UK should be grasped, with the existing substantive rights acting as a minimum threshold (an ‘ECHR-EU +’ model). In other words – the nature of the UK constitution means that leaving the EU and reforming the human rights structure should not, as a matter of principle and a matter of law, result in the diminishing of rights (unless parliament expressly says so). It is vital to re-imagine the law in a manner that is responsive to the perceived needs of human dignity, and in that regard, this article advocates that a re-imagined human rights framework includes as its ‘plus’, in the very least, a greater protection for those rights derived from the EU pillars as

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<sup>159</sup> See Katie Boyle, *What are the consequences for human rights if we change our relationship with the EU?*, ECONOMIC AND SOCIAL RESEARCH COUNCIL - EXPLAINER (Apr. 2016), <https://ukandeu.ac.uk/explainers/what-are-the-consequences-for-human-rights-if-we-change-our-relationship-with-the-eu/>.

<sup>160</sup> See e.g. Lady Hale, *supra* note 32.

<sup>161</sup> See Elliott, *supra* note 140. See also Brice Dickson, *Repeal the HRA and Rely on the Common Law?*, in *THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP?* 124,131 (K. S. Ziegler et al. eds.,2015).

well as the broader international human rights framework, including economic, social and cultural rights.

Whilst Westminster parliamentary committees have already commenced scrutiny of human rights reform and should continue to maximise their available resources in this regard, it is imperative that increased safeguards in the legislative process be introduced. For example, a presumption against any delegated legislation that engages with the broad EU human rights framework, resulting in a much wider exemption than currently exists in the EU (Withdrawal) Bill, would be advisable. Whatever form human rights law takes in the UK's future constitutional makeup, political legitimacy in a difficult and polarised constitutional climate means reform must be preceded by a lengthy deliberative process across the jurisdictions that is fair, participative, democratic and informed. While ambitious, such a process should not shy away from the theoretical underpinnings of human rights, asking the public what it means to them to be human today and how this vision might be better reflected in our national and devolved laws for the benefit of all.